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No. 669

In the Supreme Court of the United States

October Term, 1964

THE KLIX CORPORATION, Petitioner

vs.

CABLE VISION, INC. and IDAHO MICROWAVE, INC., Respondents

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Substantial misstatements of fact and a studied attempt at obfuscation compel the filing of a brief in reply to Respondents' Brief in Opposition.

I. RESPONDENTS IGNORE THE UNDISTURBED FACTUAL DETERMINATIONS.

A. Both lower courts rejected the master antenna analogy.

Respondents' arguments are predicated to a substantial degree upon a factual premise rejected by both

lower courts. Respondents argued below that their conduct consists only of furnishing reception equipment; that their equipment is analgous to apartment house antennae; that they are doing nothing which subscribers could not do for themselves.(1) The trial could expressly rejected this argument. It held in Conclusion of Law No. 4:

> "4. The activities of the plaintiffs in picking up, demodulating, electronically treating, regenerating and distributing the signals of the television stations whose programs are offered to their subscribers in Twin Falls, and in some cases converting such channels to different frequencies than those upon which they have been transmitted by the originating station, together with the other activities of said plaintiffs in the selection of signals and advertisement of their functions to prospective subscribers and the collection of fees from subscribers constitute more than simply the reception of television programs. Such activities constitute a commercial enterprise in competition with television station KLIX in Twin Falls for television viewers. The so-called community antenna in Twin Falls, operated by plaintiff Cable Vision, Inc., is, in effect, reproducing the television programs over which KLIX has acquired a valid contractual right of first call in the community of Twin Falls, Idaho."(2)

The Circuit Court rejected Respondents' arguments that the trial court's findings were unsupported. Its opinion remands the case for the purpose of enabling Petitioner to assert a derivative statutory copyright remedy.(3) If the Circuit had found acceptable Re-

(1) Tr. Vol. 3, p. 299-301.
(2) See also 211 F. Supp. 56.
(3) 335 F(2d) 353, 354.

spondents' argument to the effect that they simply supplied television reception equipment, the remand of the case for the purpose of asserting a derivative statutory remedy would have been a useless gesture. No one contends that merely supplying reception equipment constitutes infringement of copyright. Adoption of the Respondents' master antenna theory would have resulted necessarily in an order by the Circuit that the case be dismissed.(4)

B. The Intermountain case is not before the court.

Respondents' reliance upon *Intermountain Broadcasting and Television Corporation v. Idaho Microwave, Inc.* (1963) 196 F.Supp 315, is misplaced. That case involved different parties; the facts were entirely different; the legal theories were not comparable. Judge Sweigert expressly distinguished the cases in his memorandum opinion in the instant case.(5) The Salt Lake City stations did not claim any rights under contracts which would correspond to the contractual rights proved by Petitioner in the case at bar insofar as their relationship to Cable Vision was concerned.

The reassertion in this court of the factual arguments rejected by both of the courts below suggest that Respondents are unable to support the position of the Circuit upon the basis of its own decision.

II. RESPONDENTS REFUSE TO FACE THE CONSTITUTIONAL ISSUES PRESENTED.

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(4) The Federal Communications Commission has also rejected the master antenna analogy. Cf. Carter Mountain Transmission Corp. v. FCC. (D.C. Cir. 1963) 321 F(2d) 359, cert. den. 375 U.S. 951, 11 L.Ed.(2d) 312, 84 S. Ct. 442.
(5) 211 F.Supp. 56.

A. Whether states may apply the tortious interference doctrine where the subject matter of the contract is copyrighted material is clearly presented.

Respondents are totally in error in their assertion that no facts establishing a separable tort were proved.(6) The trial court found that Cable Vision's conduct constituted tortious interference with the advantages conferred by contract under Idaho law. The Circuit did not disturb the finding. It held instead that such Idaho law was inapplicable on constitutional grounds. Significantly, Respondents do not challenge Petitioner's authorities that tortious interference with contract and copyright infringement are separate and distinct torts giving rise to distinct causes of action.(7) Nor do Respondents challenge Petitioner's position that the sanctions applied by the District Judge are substantially different from the remedies available in the event of infringement. Respondents ignore the proposition that the imposition of liability for tortious interference in the manner provided by the decree of the District Judge does not and cannot conflict with the federal policy inherent in the imposition of liability to the copyright owner for the federal tort. No attempt is made by Respondents to explain why states may not apply remedies appropriate in the application of the tortious interference doctrine any more than they are precluded from applying sanctions for conversion or fraud or inducing a breach of contract or any other traditional tort simply because the subject matter of the contract is a federally protected monopoly.

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(6) Respondent's Brief, p. 10.
(7) Petition, Point II, pp. 27-33.

Respondents quarrel with the view of both lower courts to the effect that their conduct constitutes infringement vis-a-vis the copyright proprietor.(8) Petitioner suggests that if infringement constitutes all or a part of the means whereby tortious interference is achieved, there is no logical reason to deny the states the power to impose sanctions appropriate to enjoin the state tort and to leave to the federal government the power to impose sanctions appropriate for the violation of the federally protected interest. The sanctions to remedy the separate legal wrong do no violence to the federal scheme.

The holding of the lower courts that Respondents' conduct constitutes infringement belies their argument that they are using something in the public domain.

The propriety of the Circuit's view to the effect that the state tort may not be applied under the *Sears* and *Compco* decisions is precisely the question at issue. Respondents add nothing by quoting the Circuit's language to the effect that these cases are dispositive. Neither of them involve the question. That the extension of the composite *Sears-Compco* doctrine to preclude the assertion of the common law remedy is inconsistent with the rationale of other cases decided by this court is made clear in Point II of the Petition. Such apparent inconsistencies and the fact that the question was not involved in *Sears* and *Compco* justifies review.

B. Whether uncopyrighted, unpublished programs are subject to state remedies is clearly presented.

(8) cf. Respondent's brief, note 12 with 334 F(2d) 353, 354 and 211 F. Supp. 56

Respondents fail to come to grips with the fact that there is no statutory remedy for the infringement of a so-called common law copyright. The only remedies available are under state law. Where the state of Idaho provides a remedy in the nature of an injunction to prevent tortious interference with contractual rights and the subject matter of the contract is a Section 2 program, there is nothing in the Constitution or the copyright statute which prohibits application of the state law. Even, therefore, if this court should rule contrary to Petitioner's position with respect to the application of the tortious interference doctrine as to copyrighted materials, there is no justification for the Circuit's decision insofar as it affects unpublished, uncopyrighted programs.

C. Whether Sears and Compco apply to uncopyrighted, unpublished television shows is clearly presented.

Sears and *Compco* dealt with articles which were not patentable for lack of novelty. There is no provision in the patent statute applying common law to patents in a manner comparable to Section 2 of the Copyright Act. Even if it be said that protection of trade secrets by common law is comparable to the applicability of common law under Section 2 of the Copyright Act, it is clear that *Compco* and *Sears* do not reach cases in that category. Respondents do not and cannot quarrel with the concept that the proprietor of a literary work may, if he chooses, refrain from publishing it and retaining a perpetual monopoly.(9) Nor do they challenge

(9) cf. authorities cited in Petition, pp. 23-27.

the proposition that broadcasting does not constitute publication.[10]

It necessarily follows that state and not federal law must determine the nature of the sanction to be applied. The Ninth Circuit decision denies to the state of Idaho the right to apply its own sanctions to programs in this category, notwithstanding the fact that there is no federal remedy.

III. RESPONDENTS' BRIEF LACKS CANDOR ON THE QUESTION OF CONFLICT AMONG CIRCUITS.

Respondents concede a conflict between the Ninth Circuit decision and *Capitol Records v. Mercury Records.*[11] They overlook *Flexitized v. National Flexitized Corporation*[12] decided by the Second Circuit since *Sears* and *Compco*, wherein the court concluded that state law was applicable even though plaintiff's trademark was held to be invalid under the statute. They also refused to acknowledge the decisions in *Uproar Company v. NBC*[13] and *Ettore v. Philco TV Broadcast Corp.*,[14] which held that *Capitol Records* overruled *RCA v. Whiteman.*[15]

It is no answer to the position taken in Point I-B of the Petition[16] that this court did not overrule *INS v. AP*[17] in *Sears* and *Compco*. As the Petition

(10) Supra at 24.
(11) CCA 2 (1955) 221 F(2d) 657.
(12) CCA 2 (1964) .. F(2d) ... 142 U.S.P.Q. 334.
(13) D.C. Mass. (1934) 8 F.Supp. 358; aff. CCA 1 (1936) 817 F(2d) 373, cert. den. 298 U.S. 670, 80 L.Ed. 1395, 56 S. Ct. 835.
(14) CCA 3 (1956) 229 F(2d) 481, cert. den. 351 U.S. 926, 100 L.Ed. 1456, 76 S. Ct. 783.
(15) CCA 2 (1940) 114 F(2d) 86, cert. den. 311 U.S. 712, 85 L.Ed. 463, 61 S. Ct. 393.
(16) Petition, pp. 15-23.
(17) International News Service v. Associated Press (1918) 248 U.S. 215, 63 L.Ed. 211, 39 S. Ct. 68, 2 ALR 293.

alleges, the parties themselves and the United States as amicus curiae expressly suggested that *Sears* and *Compco* presented different problems of federalism than *Capitol Records, Ettore* and similar cases following *INS vs. AP*. Respondents do not answer the argument that the Ninth Circuit's decision substantially extends the holding of *Sears* and *Compco* to a factual situation not present in those cases.

The Respondents also ignore the authorities presented in Point III-B of the Petition wherein at least one circuit and a number of lower courts held that the common law doctrine of tortious interference with contractual relationships is applicable to contracts involving copyrighted or patented material.

IV. CONCLUSION.

Upon analysis, Respondents' Brief in Opposition emphasizes the necessity and urgency of review of the Ninth Circuit's decision by this court. The Petition for Certiorari should be granted and the Court should determine the questions presented in the Petition.

RESPECTFULLY SUBMITTTED this 6th day of January, 1965.

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